

NORTHWEST TERRITORIES INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 05-052

Files: 04-275-4,04-264-4

June 16, 2005

BACKGROUND

This matter arose as a result of a request from two individual Third Parties to review a decision made by the Labour Standards Board to disclose certain records to an Applicant. The records in question named the Third Parties and contained certain business and personal information about them. The Third Parties are two of several former officers or directors of a non-profit organization which received significant public monies to conduct a specified program. The organization ceased operations at some point, although no winding-up process appears to have taken place. An employee or employees of the organization filed a complaint with the Labour Standards Board about allegedly unpaid wages and the Board conducted an investigation and made a finding. Because the organization itself was no longer in operation, the Board determined that the individual former officers and/or directors were responsible for the payment of the debt found to exist.

Each of the Third Parties had been given notice pursuant to Section 26 of the *Access to Information and Protection of Privacy Act* that the Board was considering the disclosure of certain records. Edited copies of the records were provided to several Third Parties and they were told they had 60 days to advise the Board as whether or not they had any objections to the disclosure of the information. Two of them responded and, in both cases, said that they would not "consent" to the disclosure of the records in question.

ISSUE

The issue in this case is simply whether or not the public body properly applied the exceptions to the disclosure of information and, in particular, whether their decision to disclose the identified records was appropriate.

DISCUSSION

The records in question have been classified in 10 categories as follows:

1. Labour Standards Board letters to all Directors regarding the confirmation that certificates had been issued against the business in question;
2. Labour Standards Board letters to all Directors regarding receipt of notice regarding an appeal of Certificate # 2049A
3. Certificate of the Labour Standards Board in all Director's names;
4. General administrative documentation between Labour Standards Board personnel and Directors;
5. Supreme Court Memorandum of Satisfaction - noting all Directors
6. Application for Incorporation
7. Invoice for costs process servicing
8. Affidavits of Service to all Directors
9. Letter to all Directors advising of the Labour Standards Board's decision
10. Labour Standards Board's decision.

One or both of the Third Parties' names appear in most of the records in question. If my understanding is correct, the public body intends to edit all names out of the records before disclosing them. My recommendations are based on the understanding that the names and home addresses of the Third Parties will be severed so as to protect, as far as possible, their personal information from improper disclosure. For those records which do not contain the name of one of the two Third Parties who have asked me to review this matter, the name of other directors of the non-profit organization appear. Although this review was requested by only two of several directors, my recommendations apply to all of them equally.

There are a number of sections of the *Access to Information and Protection of Privacy Act* which are applicable to this request.

The first of these is section 23 which is the section which provides for the protection of personal privacy and prohibits a public body from disclosing personal information where that disclosure would be an unreasonable invasion of a Third Party's privacy. That section is as follows:

23. (1) The head of a public body shall refuse to disclose personal information to an applicant where the disclosure would be an unreasonable invasion of a third party's personal privacy.

(2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where

- (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
- (b) the personal information was compiled and is identifiable as part of an investigation into a possible contravention of law, except to the extent that disclosure is necessary to prosecute the contravention or continue the investigation;
- (c) the personal information relates to eligibility for social assistance, student financial assistance, legal aid or other social benefits or to the determination of benefit levels;
- (d) the personal information relates to employment, occupational or educational history;
- (e) the personal information was obtained on a tax return or gathered for the purpose of collecting a tax;
- (f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities;
- (g) the personal information consists of personal recommendations or evaluations about the third party, character references or personnel evaluations;

- (h) the personal information consists of the third party's name where
 - (i) it appears with other personal information about the third party, or
 - (ii) the disclosure of the name itself would reveal personal information about the third party;
- (i) the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation; or
- (j) the personal information indicates the third party's race, religious beliefs, colour, gender, age, ancestry or place of origin

(3) In determining whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

- (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of the Northwest Territories or a public body to public scrutiny;
- (b) the disclosure is likely to promote public health and safety or to promote the protection of the environment;
- (c) the personal information is relevant to a fair determination of the applicant's rights;
- (d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people;
- (e) the third party will be exposed unfairly to financial or other harm;
- (f) the personal information has been supplied in confidence;
- (g) the personal information is likely to be inaccurate or unreliable; and

- (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where

- (a) the third party has, in writing, consented to or requested the disclosure;
- (b) there are compelling circumstances affecting the health or safety of any person and notice of the disclosure is mailed to the last known address of the third party;
- (c) an Act of the Northwest Territories or Canada authorizes or requires the disclosure;
- (d) the disclosure is for research purposes and is in accordance with section 49;
- (e) the personal information relates to the third party's classification, salary range, discretionary benefits or employment responsibilities as an officer, employee or member of a public body or as a member of the staff of a member of the Executive Council;
- (f) the personal information relates to expenses incurred by the third party while traveling at the expense of a public body;
- (g) the disclosure reveals details of a licence, permit or other similar discretionary benefit granted to the third party by a public body, but not personal information supplied in support of the application for the benefit;
- (h) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body, but not personal information supplied in support of the application for the benefit or that is referred to in paragraph (2)(c); or
- (i) the disclosure reveals financial and other details of a contract to supply goods or services to a public body

Also relevant to this discussion is Section 26 of the Act which provides that when a public body is considering the disclosure of personal information, they must give the Third Party notice of that intention and provide them with the opportunity to respond.

26. (1) Where the head of a public body is considering giving access to a record that may contain information

- (a) the disclosure of which would be an unreasonable invasion of a third party's personal privacy under section 23, or
- (b) that affects the interests of a third party under section 24, the head shall, where reasonably possible, give written notice without delay to the third party in accordance with subsection (2).

Also relevant is section 27 which reads:

27. (1) The head of the public body shall decide whether or not to give access to the record or to part of the record not later than 90 days after notice is given under subsection 26(1), but no such decision may be made before the earlier of

- (a) 61 days after the day on which notice is given; or
- (b) the day a response is received from the third party.

Finally, I would refer to section 3 of the Act, the relevant portions of which are as follows:

3. (1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

- (f) a record in a registry operated by a public body where public access to the registry is normally permitted.

(2) This Act

- (a) is in addition to and does not replace existing procedures for access to government information or records;

- (b) does not in any way limit access to government information or records normally available to the public;

The first thing to note is that section 23 is mandatory. If the record contains personal information, the disclosure of which would be an unreasonable invasion of a third party's privacy, the public body is prohibited from disclosing it. However, the fact that a record contains personal information of a third party does not, in and of itself, trigger the prohibition of 23(1). The disclosure of the information must also be an unreasonable invasion of the third party's privacy.

It should also be noted that although the consent of a Third Party to the disclosure of his or her information is a complete answer to section 23(1), the lack of consent may not prevent the disclosure. In this case, therefore, the refusal of the two Third Parties to consent to the disclosure, although a relevant consideration, is not enough by itself to prevent the disclosure. All of the circumstances must be considered.

There are situations in which the disclosure of information will be deemed to be an unreasonable invasion of a third party's privacy. Those situations are set out in section 23(2). The only one of those deemed prohibitions which might apply in this case is section 23(2)(d) which states that it will be deemed to be an unreasonable invasion of privacy if the information relates to "employment, occupational or educational history". Arguably, the disclosure of the information in question relates to the "employment history" of the two individual Third Parties as it identifies them as being directors of the non-profit organization. That having been said, however, that particular piece of information is in the public domain already. The names of all officers and directors of companies and societies registered in the Northwest Territories are available to the general public through the Companies Registry system. In light of section 3 which allows for continued access to public registries, the reality of the situation is that the fact that the Third Parties were directors of the non-profit organization is already in the public domain. In these circumstances, I would not consider the disclosure of this

information to qualify for an exemption pursuant to Section 23(1) of the Act.

Section 23(4) provides for circumstances in which the disclosure of personal information will be deemed **not** to constitute an unreasonable invasion of the Third Party's privacy. I cannot say, looking at those exceptions, that any of them apply to the information in the records in question.

That leaves us with Section 23(3). This section applies in circumstances where neither subsection (2) (deemed invasive of privacy) or subsection (4) (deemed not invasive of privacy) apply. In these circumstances, the public body is required to consider all of the circumstances of the case and to determine whether or not the disclosure of the information in question might be considered to be an unreasonable invasion of a Third Party's privacy and to make its decision with respect to disclosure based on all of the circumstances.

Subsection 23(3) provides us with some guidelines, though it does not preclude the consideration of other matters or circumstances. Of the listed considerations, in my opinion, the following apply to this case:

(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people;

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

The non-profit organization in question was mandated to deal with a number of aspects of certain claims and grievances of aboriginal peoples. As such, it had a very prominent public persona, unlike many other non-profit groups which work behind the scenes. The Applicant in this case is a media person who I gather is interested in examining the effectiveness of the non-profit and how it used the public funds made

available to it to achieve its mandate. Most of the records in question are standard form documents which are used in dealing with Labour Standards matters. In this category I put the following:

- a) Labour Standards Board letters to all Directors regarding the confirmation that certificates had been issued against the business in question;
- b) Labour Standards Board letters to all Directors regarding receipt of notice regarding an appeal of Certificate # 2049A
- c) Certificate of the Labour Standards Board in all Director's names;
- d). Invoice for costs process servicing
- e) Letter to all Directors advising of the Labour Standards Board's decision

Others are standard court documents which have been filed with the Supreme Court and are, therefore, public records in any event. These include:

- f) Affidavits of Service to all Directors
- g) Supreme Court Memorandum of Satisfaction - noting all Directors

Another record is a copy of the incorporation documents of the non-profit organization, which is available to the general public from the Societies Registry of the Northwest Territories:

- h) Application for Incorporation

Finally, there is the Labour Standards Board's decision with respect to the complaint in question. The decision, as I understand it, confirmed the decision made by the Labour Standards Officer and was filed in the Supreme Court of the Northwest Territories pursuant to section 53(3) of the *Labour Standards Act*. That provision provides as follows:

53(3) The Board may, at any time, cause the certificate confirmed or made under subsection (2) to be filed with the Clerk of the Supreme Court and upon that the certificate shall be enforceable as a judgment or order of the Supreme Court in favour of the Board for the recovery of a debt in the amount of wages owing as set out in the certificate.

Once again, once a record is filed in the Court, it becomes a public record, open to inspection by the general public. In this case, there is no reason to deny access to the record because of this. If it is already in the public domain, there is little that the individual can do to protect his identity.

This leaves only various administrative records which are not otherwise already available from other public sources. These records include the employment records kept by the non-profit society, the complainant's job offer and correspondence between the complainant and the non-profit about the responsibilities of her position, her hourly income and rate of pay, internal staff memorandums regarding overtime policies and other internal personnel matters of the non-profit organization. It also includes correspondence between the Labour Standards Board and individual officers and/or directors of the non-profit organization with respect to the complaint. Some of the information contained in these records is clearly the personal information of the Complainant, the disclosure of which would be deemed to be an unreasonable invasion of her privacy absent her consent to the disclosure. As to the rest, they contain numerous references to the two individual Third Parties (and other directors of the non-profit organization as well). The references to these individuals, in many instances, is in the context of their role as officers and directors and not in the context of their personal lives. In this situation I would suggest that it is not personal information the disclosure of which would result in an unreasonable invasion of personal privacy. That having been said, however, section 24 provides that a public body cannot, in certain circumstances, disclose the business or commercial information of a Third Party. The relevant parts of that section for the purposes of this recommendation are as follows:

24. (1) Subject to subsection (2), the head of a public body shall refuse to disclose to an applicant ...

- (b) financial, commercial, scientific, technical or labour relations information
 - (i) obtained in confidence, explicitly or implicitly, from a third party, or
 - (ii) that is of a confidential nature and was supplied by a third party in compliance with a lawful requirement;

In my opinion, this section applies to many of the records classified as “administrative” records which include financial and labour relations information of a third party (the non-profit organization) provided to the Labour Standards Board. These would be considered to be of a confidential nature. They were supplied by third party (the non-profit organization) in response to a legal requirement imposed on it by the Labour Standards Board pursuant to the *Labour Standards Act*. It is my opinion that these records should not be disclosed as to do so would violate section 24(1)(b). These would include:

- a) an undated record entitled “Chronology of Events (1999)”
- b) letter from the non-profit organization to the complainant dated August 21, 2001
- c) employee time records for the non-profit organization
- d) inter-office memorandum dated September 6, 2001
- e) memo dated June 15, 2001 regarding “lieu time”
- f) letter from complainant to the directors of the non-profit organization dated January 18, 2001
- g) memo dated May 1, 2001 regarding overtime
- h) ledger print out
- l) memo dated December 5, 2001 regarding Lay Off Notices

Other records which fall under this “administrative” category constitute correspondence between the parties involved and the Labour Standards Board. There are two

categories of such records - those from the Board to the other parties involved and those from the other parties involved to the Board. With the exception of names and addresses of individuals, which should be severed, the correspondence from the Board to the various parties do not appear to contain personal information, the disclosure of which might constitute an unreasonable invasion of privacy. On the other hand, much in the correspondence from the parties back to the board include opinions, unproven accusations and argument with respect to the issues at hand.

By definition, opinions held by a person are that person's personal information unless they are opinions about another person, in which case the opinion is the personal information of the other person. Section 2 provides a definition of personal information which includes:

- "personal information" means information about an identifiable individual, including
- (h) anyone else's opinions about the individual,
 - (l) the individual's personal opinions, except where they are about someone else;

Based on this definition, several pieces of correspondence cause me concern.

The first is a letter from the complainant to the Board dated April 15, 2003. It contains a number of unsubstantiated allegations and comments about one of the Third Parties. The allegations contained in this letter are unproven and are, therefore, expressions of opinion about the Third Party. I am satisfied that the disclosure of this personal information would constitute an unreasonable invasion of the Third Party's privacy and should, therefore, only be disclosed with the Third Party's consent.

Similarly, in a letter dated December 18, 2002 from one of the Third Parties to the Board, the Third Party outlines a number of statements that constitute his opinion about

the situation and includes statements about his opinion of the Complainant. As noted above, the opinions in this letter about the Complainant belong to her and without her consent should not be disclosed as to do so would, in my opinion, constitute an unreasonable invasion of her privacy. Further, this letter contains other opinions held by the writer about the situation he finds himself in and, as such are his own personal information. Again, I would have no difficulty in finding that the disclosure of this information would constitute an unreasonable invasion of his privacy. Neither of these letters should, therefore, be disclosed.

Similarly, a fax memo from the Third Party to the Board dated April 21, 2003 contains some opinion as well. To the extent that it contains the Third Party's opinion about another person or about the situation, it should not be disclosed.

A letter from the Third Party to the Board dated April 21, 2003 contains one the Third Parties' argument with respect to his personal liability for the payment of the amount deemed owing by the Labour Standards Board. It is a statement which outlines his opinion about the issues. It also contains his opinion as to the actions of others. Without the consent of the parties concerned, I do not feel that this letter should be disclosed.

This leaves notes made by members of the staff at the Labour Standards Board. Provided names and other personal information such as telephone numbers and addresses are severed, I see no reason why these records should not be disclosed.

RECOMMENDATION

Based on the above analysis, it is my opinion that the public body properly applied the provisions of the *Access to Information and Protection of Privacy Act* in deciding to disclose the ten (10) categories of records outlined at the beginning of this report, with the exception of those records which are classified as "general administrative

documentation between Labour Standards Board personnel and Directors". In connection with these records, I agree with the public body that the following should be disclosed, provided that all identifying information is first severed:

- a) all correspondence from the Labour Standards Board to the various parties involved;
- b) all notes made by employees of the Labour Standards Board in connection with their dealings with the individuals in question

The following records are protected from disclosure pursuant to either section 23 or 24 of the Act

- a) those records provided in confidence to the public body in response to a lawful request, including:
 - i) an undated record entitled "Chronology of Events (1999)"
 - ii) letter from the non-profit organization to the complainant dated August 21, 2001
 - iii) employee time records for the non-profit organization
 - iv) inter-office memorandum dated September 6, 2001
 - v) memo dated June 15, 2001 regarding "lieu time"
 - vi) letter from complainant to the directors of the non-profit organization dated January 18, 2001
 - vii) memo dated May 1, 2001 regarding overtime
 - viii) ledger print out
 - ix) memo dated December 5, 2001 regarding Lay Off Notices

- b) any correspondence from the various parties concerned to the Board which contains statements of opinion. If the opinion is from one person about another, if the person of whom the opinion is expressed has consented to the disclosure of the opinion, it may be disclosed.

Elaine Keenan Bengts
NWT Information and Privacy Commissioner